Office-Supreme Court, U.S.
FILED
DEC 27 1962
JOHN F. DAVIS, CLERK.

No. 442.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

ROSCOE C. BUCKLES, VERA FAYE BUCKLES, His Wife, GEORGE A. BUCKLES, CHESTER R. BUCKLES, and MYRLE BUCKLES, His Wife,
Appellants,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY, a Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

PETITION FOR REHEARING.

STANLEY B. BALBACH,
CHARLES M. WEBBER,
RICHARD L. THIES,
102 North Broadway,
Urbana, Illinois,
Telephone: 367-1126,
Attorneys for Appellants.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

No. 442.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

ROSCOE C. BUCKLES, VERA FAYE BUCKLES, His Wife; GEORGE A. BUCKLES, CHESTER R. BUCKLES, and MYRLE BUCKLES, His Wife,
Appellants,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY, a Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

PETITION FOR REHEARING.

This Court on an appeal from the Supreme Court of Illinois granted the motion to dismiss the Jurisdictional Statement and treating the paper whereon the appeal was taken as a petition for writ of certiorari, certiorari was denied.

The opinion of the Supreme Court of the State of Illinois reported at 24 Ill. 2d 520 a copy of which is made a part of the Jurisdictional Statement as Appendix A, states the facts accurately and fully and the reasoning based on those facts is persuasive; however, the result of the decision may well be to take by judicial fiat the subsurface rights of landowners throughout the country.

This is a case of first impression and, while there is no other case exactly in point, this court in an opinion announced December 17, 1962, Schroeder v. City of New York, No. 75, October term, 1962 said "the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process,—the right to be heard." Just as the right to notice is a corollary of the right to be heard, so is the right to introduce evidence. It is just as much a deprivation of due process to refuse to permit a landowner to offer evidence and to direct the jury as to the amount of the verdict to be brought in as it is to refuse a trial by jury completely. A trial which gives the trier of fact no duties to perform is a sham, a mockery. It is no trial at all in the purview of constitutional guaranties and this trial was all the more ludicrous because even under the view of the Illinois Supreme Court and the defense there was an actual conflict in the testimony as to the shrinkage in value of the surface, such figures ranging on the testimony actually presented in court from $4,000 to $16,000. The trial court, even if it had a right to substitute itself for the jury on the question of the value of the thing taken, surely had an obligation to submit the conflicting evidence to the jury on the damages to the thing not taken.

This conflict in evidence was brought out in the appeal to the Illinois Supreme Court—at page 296 of the Abstract of Record in the testimony of William L. Syrcle for the defendants out of the presence of the jury:

> "Q. You did mention one item of damage. In your opinion would that element of damage be apart from the taking of the easement?
>
> "A. Again I will say a conservative appraiser would consider that the average buyer would of course put more weight on the damage about Herscher. My

personal question is that the Herscher field has been damaged to the extent of probably 25 per cent of the value before the field was started. My opinion is that this land will be damaged to the extent of roughly 20 per cent of $100 per acre.

"Q. That is in addition to the——

"A. In addition to the value of the easements taken."

and petitioners' evidence was (Abstract of Record, page 233):

"The Buckles land is worth $25.00 an acre less as a result of the existence of the easement as to gas storage."

and the trial court in effect said that it had no duty to submit a conflict in the evidence to the jury. The Supreme Court of Illinois was advised of this conflict in the evidence at page 89 of the Statement, Brief and Argument for Appellants:

"In this case the court usurped the function of the jury by the rather simple expedient of excluding all evidence contrary to the court's theory of the case. The court's theory seemed to be that the St. Peter sandstone had no value and that therefore its use by the petitioner was simply a burden rather than the expropriation of a natural resource. Having arrived at this decision then the only admissible evidence in the mind of the court was as to the dollar value of that burden. Even on this point the court was not entirely consistent since the petitioner's witnesses testified that the damage to the land for farm purposes was $25.00 per acre but one of the respondents' witnesses in giving his testimony of value included the statement that the damage to the surface was $100 per acre (A. 297) or $16,000.00, in addition to the value of the easement taken."

The Court, in addition to being unwilling to submit a conflict in evidence to the jury, refused all evidence as to the value of the easement rights taken and went so far as to accept testimony from appraisal witnesses offered by the petitioner not one of whom had any knowledge in regard to the gas storage easement rights or as to the contemplated use by the plaintiff of the easement rights which it sought. While admitting evidence of plaintiff's witnesses, whose lack of qualification is shown at pages 233 and 234 of the Abstract of Record in questions and answers out of the presence of the jury:

> "Q. Whether or not the gas storage inherently has any valuation in the easement you are not prepared to say?
>
> "A. Right."
>
> "Q. Then you are not attempting to put any value on the St. Peter sandstone under this at all. Is that correct?
>
> A. That is correct."

and at page 244:

> "Q. Do you know or did you know at the time you appraised this land what was below the surface of this land?
>
> "A. No."

the court denied the evidence offered by defendants' witnesses as to the value of the easement rights actually taken although defendants' evidence included testimony (Abstract of Record, pages 275 and 302) by men who were experts in making reservoir studies and who were petroleum engineers qualified for appraisal work of this type, and also denied the testimony of an appraisal witness of the defendants (Abstract of Record, page 290) who had qualified himself by becoming acquainted with gas storage projects in the State of Illinois and with comparable sales in other states of gas storage easement rights and with

the cost of substitute facilities. The court in effect accepted the testimony of men who had no idea of the value of the real estate burdened by the easement because they did not know the nature of the easement rights taken nor the use to which those easement rights would be put.

The court is saying that: "I do not have to listen to the evidence of the landowners. I only have to listen to the evidence of the plaintiff" in almost an exact paraphrase of the Justice of the Peace who would listen to only one side of the case because when he heard both sides he became confused. To say that this is due process is to endorse the attitude of some of the early Judges in this country who said: "We'll give you a fair and square jury trial, and then hang you."

The defendants had not exploited the natural resources of this storage dome that was under their land and it may well have been that they would never have exploited it but that does not mean that the land value does not reflect this resource. If a farmer has coal under his land, it is unlikely that he alone will be able to realize an economic gain from its mining but the fact remains that the value of the land reflects the value of the coal deposits. In this case an expert appraisal engineer testified (Abstract of Record, page 281) that the fair market value of the defendants' property before the taking was $291,000 ($1,818.00 per acre) and the fair cash market value after the taking was $88,000 ($550.00 per acre), which testimony was supported by the testimony of another reservoir engineer and other appraisers with a general appraisal background. The plaintiff had no evidence of any type as to the value of the thing taken.

The problem of the valuation of underground reservoirs was considered in a line of cases beginning with **Montana Ry. v. Warren** (1890), 137 U. S. 348, 352, 353, when the Supreme Court affirmed the Montana Court, saying:

"The claim in controversy had been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. . . . That this mining claim, which may be called only a prospect', had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such 'prospects' are the constant subjects of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation; it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such 'prospect' has a market value; and the absence of certainty is not a matter of which the . . . (condemnor) can take advantage, when it seeks to enforce a sale . . ."

and other cases reversing trial courts for rejecting alleged mineral values even though the presence or amount of minerals was conjectural and the ultimate recoverable mineral value entirely speculative include **Cal-Bay Corp. v. U. S.**, 169 F. 2d 15, **cert. denied** 335 U. S. 859 (1948); and **Eagle Lake Improvement Co., et al. v. U. S.** (1944), 141 F. 2d 562; and **Phillips v. U. S.** (1957), 243 F. 2d 1.

As a result of our case thousands of landowners throughout the United States are being told by the men acquiring gas storage easements for the gas companies that: "If we want your gas storage easement rights, we'll take them and the only thing that you are entitled to is the damage to your surface use. You are not entitled to any compensation for the easement rights which we are taking." By failing to allow oral argument and by failing to deliver a written opinion, this Court has, in effect, granted to the gas companies as to states which permit the use of the power of eminent domain to acquire underground gas storage easements all of the subsurface gas storage rights at no cost except for damages to property not taken.

CONCLUSION.

The petitioners respectfully pray that this appeal be reinstated or that treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari be granted; and that this Court take jurisdiction on the record in this case and the appellants be permitted to file briefs upon the merits and be permitted to make oral argument thereof, and that this Court declare the Illinois gas storage act repugnant to the Federal Constitution or order that this case be retried with the direction that evidence be received as to the value of the real estate taken in fixing the compensation due the appellants.

Respectfully submitted.

By .....

STANLEY B. BALBACH.
CHARLES M. WEBBER.
RICHARD L. THIES.
102 North Broadway,
Urbana, Illinois.
Telephone: 367-1126.
Attorneys for Appellants.

I do hereby certify that this petition is presented in good faith and not for delay, and this petition is restricted to substantial grounds available to the petitioners although not previously presented.

.....

Stanley B. Balbach